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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

MIRABELLA DESIGN BUILD, Plaintiff and Appellant, v. MATTHIAS VON HERRATH et al., Defendants and Respondents.	D048168 (Super. Ct. No. GIN038871)

APPEAL from a judgment of the Superior Court of San Diego County, Jacqueline M. Stern, Judge. Affirmed in part, and reversed in part and remanded.

Mirabella Design Build (formerly Mirabella Construction, Inc.) (Mirabella) appeals the trial court's order granting summary judgment in favor of defendants Matthias Von Herrath (Von Herrath) and Beth Ford (Ford) in its lawsuit to recover for amounts allegedly owing on a home improvement contract.

I

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Construction Project*

Von Herrath and Ford, who are husband and wife, contracted with Mirabella, a licensed contractor, to perform a remodel of their residence in Del Mar. Von Herrath is a medical doctor and Ford is a doctor of veterinary medicine. Neither Ford nor Von Herrath have any training, education or experience in building and construction or in real estate investment, except for the fact that they own their home and they undertook certain home improvement projects themselves along with the help of Ford's brother, who is a handyman. These projects included building a deck and modifying the garage and the kitchen, and Von Herrath and Ford later learned that these projects were performed without the necessary permits.

Ford and Von Herrath decided to undertake an extensive remodel of their house, and they hired an architect to plan the remodel.

In October 2002, Ford and Von Herrath solicited bids from several contractors to perform the remodeling work, one of which was Mirabella. Shannon Chilson, president of Mirabella, estimated the cost of the remodel to be $370,000. The other contractors returned bids ranging from $521,000 to $536,000. Before signing a contract with Mirabella, Ford and Von Herrath spent approximately four to five months providing details to Chilson about the construction project. In May 2003, Chilson told Ford and Von Herrath that the price was going to be $552,000, not $370,000, in part because Chilson forgot to include the cost of framing in his original estimate.

Ford and Von Herrath entered into a contract with Mirabella on June 2, 2003 (the Contract). They had no legal advice before entering into the Contract, and it was the first time they had entered into a home improvement contract. The Contract indicated that it was between Mirabella on the one hand and Von Herrath and Ford on the other, but it was signed only by Von Herrath. Ford, however, stated during the litigation that she gave Von Herrath authorization to sign the Contract.

The Contract stated that the "[t]otal contract price" was $552,445.35. According to Von Herrath, nothing was attached to the Contract when he signed it. However, at the time Von Herrath signed the Contract he had been given a 54-page bid document that detailed the work to be performed and the cost associated with it (Bid Document). Von Herrath reviewed the Bid Document before he signed the Contract to identify items that could result in substantial savings during the course of construction.

Regarding any changes made to the scope of work, the Contract stated, "Changes/alterations: Any alteration or deviation from the enclosed specifications, including but not limited to any such alteration or deviation involving additional material and/or labor costs, will be executed only upon a written order for same, signed by Owner and Contractor, and if there is any charge for such alteration or deviation, the additional charge will be added to the contract price of this contract."

During construction, Von Herrath, Ford and Chilson discussed various changes in the project.[1] In September 2003, Mirabella prepared written change orders for some of those items and billed Ford and Von Herrath for the associated cost; Ford and Von Herrath promptly paid the full amount invoiced for the change orders.

The parties also decided on many other changes during construction, but according to Von Herrath and Ford, Chilson did not indicate that any additional charge would result from those changes.

Mirabella sent invoices for progress payments on December 2003, January 2004, February 2004 and March 2004. None of the invoices indicated any charges for additions or deviations. The invoices totaled $300,000, and Ford and Von Herrath paid them upon receipt. In total, Ford and Von Herrath paid over $556,000 to Mirabella.

In May 2004 when construction was nearly complete, Mirabella presented Ford and Von Herrath with a 62-page change order for over $130,453.14 of extra costs that were incurred throughout the project (the May 2004 Change Order). The May 2004 Change Order was presented after the items were already complete, and it was not signed by Von Herrath or Ford. Von Herrath and Ford refused to pay any amount stated in the May 2004 Change Order.

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[1] For example, after the Contract was finalized Ford and Von Herrath decided to extend the family room by five feet.

B. *The Pleadings*

Mirabella filed a complaint against Von Herrath and Ford alleging that they owed Mirabella $182,898.49 plus interest. The complaint alleged causes of action for breach of contract, foreclosure of a mechanic's lien, common counts ("reasonable value," account stated, open book account)[2] and fraud. With respect to the fraud claim, Mirabella alleged that Von Herrath and Ford "made deliberate false representations to [Mirabella] that [they] would pay [Mirabella] for the work performed on the real property."

Von Herrath and Ford filed a cross-complaint against Mirabella and Chilson. The cross-complaint alleged fraud, conversion and unfair business practices (Bus. & Prof. Code, § 17200 et seq.).

C. *Von Herrath and Ford's Summary Judgment Motion*

To challenge Mirabella's claims against them, Von Herrath and Ford set a motion for summary judgment, or in the alternative for summary adjudication, for hearing on December 9, 2005. The motion made the arguments (1) that the Contract was void because it violated several provisions in Business and Professions Code section 7159, which provides that certain minimum information must be included in home improvement contracts with a value over $500 and (2) that the undisputed facts show that

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2 "A common count is not a specific cause of action . . . ; rather, it is a simplified form of pleading normally used to aver the existence of various forms of monetary indebtedness, including that arising from an alleged duty to make restitution under an assumpsit theory." (*McBride v. Boughton* (2004) 123 Cal.App.4th 379, 394.)

Von Herrath and Ford lacked the fraudulent intent necessary for Mirabella to prevail on the fraud cause of action.

The notice of motion was personally served on counsel for Mirabella on September 26, 2005, which was 74 days before the December 9, 2005 hearing date.

Code of Civil Procedure section 437c, subdivision (a) provides in relevant part that "[n]otice of the motion [for summary judgment] and supporting papers shall be served on all other parties to the action *at least 75 days before* the time appointed for hearing." (Italics added.) However, counsel for Von Herrath and Ford realized the day after serving the motion that he had mistakenly served the motion *74* rather than 75 days before the hearing date. Mirabella refused to stipulate that the notice period was adequate. Von Herrath and Ford thus filed an ex parte application requesting that the trial court move the hearing date so that the motion would be heard at least 75 days after it was served on Mirabella.

This request raised other timing problems, however, because the Code of Civil Procedure provides that a summary judgment motion "shall be heard no later than 30 days before the date of trial, unless the court for good cause orders otherwise." (Code Civ. Proc., § 437c, subd. (a).) Trial was scheduled for January 13, 2006, which was 35 days after the December 9, 2005 hearing date. As a practical matter, no alternate hearing date would allow the motion to be heard more than 30 days before trial. Therefore, in order to obtain a different date for the summary judgment hearing, Von Herrath and Ford asked the trial court (1) to find good cause to set the summary judgment hearing less than 30 days before trial, or, in the alternative (2) to continue the trial date.

Mirabella opposed the relief sought by Von Herrath and Ford, arguing that there was no good cause to continue the trial date or have the summary judgment motion heard within 30 days of trial. The trial court denied the ex parte application, and kept the summary judgment motion set for December 9, 2005.[3]

On November 15, 2005, Von Herrath and Ford filed an amended notice of the summary judgment motion, stating that the motion was also alternatively being brought as a motion for judgment on the pleadings as to each of the causes of action in Mirabella's complaint. Mirabella filed separate oppositions to the summary judgment motion and the motion for judgment on the pleadings. The opposition to the summary judgment motion addressed the motion on the merits, but it also argued that the summary judgment motion should be denied because it was to be heard less than 75 days after it was served.

At oral argument on the motions, Mirabella again argued that the summary judgment motion should be denied because Mirabella did not receive notice 75 days prior to the hearing, and that the trial court therefore did not have jurisdiction to hear the motion. Von Herrath and Ford argued that by filing an opposition on the merits to the summary judgment motion, Mirabella had waived any argument as to improper notice.

In its ruling, the trial court did not expressly address whether the summary judgment motion should be denied on the ground that Mirabella did not receive 75 days' notice. Instead, it simply proceeded to grant the motion for summary judgment. The trial court ruled (1) that the Contract did not comply with the requirement of Business and

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[3] The ex parte hearing was not reported.

Professions Code section 7159 and was therefore void, and (2) that the fraud cause of action failed on the additional ground that it was not factually supported. The trial court denied the motion for judgment on the pleadings as moot, and it also noted that the motion could not in any event go forward because it was not reserved with the court for hearing on that date.

Following the ruling on their summary judgment motion, Ford and Von Herrath dismissed their cross-complaint with prejudice, and Mirabella filed this appeal.

II

DISCUSSION

A. *Service of the Summary Judgment Motion Less Than 75 Days Before the Hearing Does Not Warrant Reversal*

Mirabella argues that the trial court erred by proceeding to decide the summary judgment motion despite the fact that the motion was served less than 75 days before the hearing. As we will explain, although we agree that the trial court erred, the error does not require reversal because Mirabella had not established any prejudice from the fact that it received 74 rather than 75 days' notice.

1. *The Trial Court Erred*

Code of Civil Procedure section 437c, subdivision (a) requires that "[n]otice of the motion [for summary judgment] and supporting papers shall be served on all other parties to the action at least 75 days before the time appointed for hearing." In light of this requirement, the trial court in effect ordered a *shortened* notice period for the summary

judgment motion when it ruled on the merits of Von Herrath and Ford's motion despite Mirabella's objection that the notice period was too short.

Case law establishes that a trial court does *not* have the authority to shorten the minimum notice period required by Code of Civil Procedure section 437c, subdivision (a). Most specifically on point is *Urshan v. Musicians' Credit Union* (2004) 120 Cal.App.4th 758, which reversed a summary judgment ruling because the trial court had heard the motion on shortened notice without obtaining the consent of the opposing party. *Urshan* explained that "a trial court's inherent power does not provide authority for a trial court to shorten minimum time periods when specified as mandatory by the Legislature," and "the express mandatory language of Code of Civil Procedure section 437c, subdivision (a) makes clear the Legislature intended to deprive trial courts of the power to shorten the notice period for hearing summary judgment motions." (*Id*. at p. 767.)

Similarly, *McMahon v. Superior Court* (2003) 106 Cal.App.4th 112, 118 concluded that "in light of the express statutory language, trial courts do not have authority to shorten the minimum notice period for summary judgment hearings." Based on this principle, *McMahon* granted a petition for writ of mandate requiring the trial court to afford the statutory notice period before hearing the summary judgment motion. *McMahon* explained that "[b]ecause it is potentially case dispositive and usually requires considerable time and effort to prepare, a summary judgment motion is perhaps the most important pretrial motion in a civil case. Therefore, the Legislature was entitled to conclude that parties should be afforded a minimum notice period for the hearing of

summary judgment motions so that they have sufficient time to assemble the relevant evidence and prepare an adequate opposition." (*Id.* at pp. 117-118.)

Based on these authorities, we conclude that the trial court erred in ruling on the merits of the summary judgment motion, over Mirabella's objection, because Mirabella did not receive the required 75-day notice period prior to the hearing.[4]

2. *The Error Does Not Warrant Reversal*

We next explain that although the trial court erred in entertaining the summary judgment motion on shortened time, Mirabella has not met its burden to show that it was prejudiced by the error.

A judgment will not be reversed unless the appellant established prejudice and a miscarriage of justice. Code of Civil Procedure section 475 provides that "[n]o judgment, decision, or decree shall be reversed or affected by reason of any error . . . unless it shall appear from the record that such error . . . was prejudicial, and also that by reason of such error . . . , the said party complaining or appealing sustained and suffered substantial injury, and that a different result would have been probable if such error . . . had not

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4 Citing *Carlton v. Quint* (2000) 77 Cal.App.4th 690, 697, and other similar authority, Von Herrath and Ford argue that Mirabella waived its right to object to the shortened notice because it appeared at the hearing and defended the motion on the merits. We reject this argument because Mirabella repeatedly made it clear in its briefing and during the summary judgment hearing that it was objecting to shortened notice and that it believed the summary judgment motion should be denied because it did not receive adequate notice. Through these unambiguous statements, Mirabella clearly preserved its right to argue on appeal that the shortened notice requires reversal of the trial court's ruling on the summary judgment motion. (See *Boyle v. CertainTeed Corp*. (2006) 137 Cal.App.4th 645, 650 ["A party's participation in a hearing after the party's objection to the hearing as unauthorized does not constitute waiver by acquiescence"].)

occurred or existed. There shall be no presumption that error is prejudicial, or that injury was done if error is shown." Further, our Constitution provides that "[n]o judgment shall be set aside . . . in any cause . . . for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." (Cal. Const., art. VI, § 13.)

As the appellant, Mirabella has the burden to show that it was prejudiced by the trial court's error. (*Red Mountain, LLC v. Fallbrook Public Utility Dist.* (2006) 143 Cal.App.4th 333, 347 ["an appellant has the burden to show not only that the trial court erred but also that the error was prejudicial"].) Mirabella "bears the duty of spelling out in [its] brief exactly how the error caused a miscarriage of justice." (*Paterno v. State of California* (1999) 74 Cal.App.4th 68, 106.)

Here, Mirabella has not carried its burden to show prejudice. Mirabella's sole argument relating to the prejudice it suffered from receiving 74 rather than 75 days' notice focuses on depositions that were taken the day *after* the due date for Mirabella's opposition to the summary judgment motion. Mirabella argues that the shortened notice for the motion "caused prejudice to [Mirabella's] ability to respond due to the timing of depositions which had been previously noticed." Without any support in the record, Mirabella argues that the depositions "produced new and relevant material that

[Mirabella] wanted the court to consider in its decision on the Motion for Summary Judgment."[5]

The timing of the depositions does not show that Mirabella was prejudiced by the shortened notice on the summary judgment motion. We have already established that December 9, 2005, was the last practical day for the motion to be heard due to requirement that the motion be heard at least 30 days before the January 13, 2006 trial date, and that neither the trial court nor Mirabella was willing to move the trial date or allow the motion to be heard less than 30 days before trial. The due date for a party's opposition to a summary judgment motion is calculated based *on the hearing date*, not on the date that the motion was served. (Code Civ. Proc., § 437c, subd. (b)(2).) Accordingly, even if Von Herrath and Ford had served the summary judgment motion one day earlier, that extra day of notice *would not have changed the hearing date*. Thus, regardless of the amount of notice that Mirabella received, its opposition would still have been due one day *before* the scheduled depositions.[6]

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[5] The record contains no information on the nature of the depositions or whether they were even relevant to the issues presented in the summary judgment motion.

[6] We note also that the record contains no evidence suggesting that the depositions might have been scheduled *before* Mirabella's opposition was due if Mirabella had received notice of the summary judgment motion one day earlier. Further, although the trial court *might* have been persuaded to continue the hearing date and move out the summary judgment motion hearing if Mirabella had joined in the request, and this would have avoided the prejudice of which Mirabella now complains, Mirabella *opposed* that relief in the trial court. Because it took a contrary position in the trial court, it cannot now advocate that the trial date and motion date should have been *continued* to address the fact that it received only 74 days' notice.

In addition, the record contains no evidence at all about the relevance of the depositions to the issues in the summary judgment motion. Thus, even *if*, hypothetically, (1) the depositions could have been scheduled earlier had Mirabella received a full 75 days of notice or (2) the trial court had moved the trial date and continued the motion hearing, Mirabella has made no showing that being able to present evidence obtained during the depositions would have made any difference to the outcome of the summary judgment motion.

In sum, Mirabella has presented no cogent argument as to why it was prejudiced by the one-day shortened notice on the summary judgment motion.

Because Mirabella cannot establish prejudice, we conclude that the trial court's error in hearing the summary judgment motion on shortened notice does not warrant reversal of the judgment.

B. *The Trial Court's Ruling on Business and Professions Code Section 7159*

We next consider Mirabella's challenge to the merits of the trial court's ruling granting summary judgment in favor of Ford and Von Herrath.

1. *Standard of Review*

We begin our analysis with an overview of the rules governing motions for summary judgment. A defendant "moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) A defendant may meet this burden either by showing that one or more elements of a cause of action cannot be established or by showing that there is a complete defense. (*Ibid.*)

"[A]ll that the defendant need do is to show that the plaintiff cannot establish at least one element of the cause of action[;] the defendant need not himself conclusively negate any such element . . . ." (*Id.* at pp. 853-854.) If the defendant's prima facie case is met, the burden shifts to the plaintiff to show the existence of a triable issue of material fact with respect to that cause of action or defense. (*Id.* at p. 849; *Silva v. Lucky Stores, Inc.* (1998) 65 Cal.App.4th 256, 261 (*Silva*).)

We review a summary judgment ruling de novo to determine whether there is a triable issue as to any material fact and whether the moving party is entitled to judgment as a matter of law. (*Certain Underwriters at Lloyd's of London v. Superior Court* (2001) 24 Cal.4th 945, 972.) "In practical effect, we assume the role of a trial court and apply the same rules and standards which govern a trial court's determination of a motion for summary judgment." (*Lenane v. Continental Maritime of San Diego, Inc.* (1998) 61 Cal.App.4th 1073, 1079.) Thus, on appeal we apply the same three-step analysis used by the trial court. "We identify the issues framed by the pleadings, determine whether the moving party has negated the opponent's claims, and determine whether the opposition has demonstrated the existence of a triable, material factual issue." (*Silva, supra,* 65 Cal.App.4th at p. 261.)

2. *Business and Professions Code Section 7159 and the Trial Court's Ruling*

The trial court's ruling that the Contract and the May 2004 Change Order were void and thus unenforceable was based on its conclusion that those documents did not comply with the requirements of Business and Professions Code section 7159. We thus now turn to the text of that statute.

Business and Professions Code section 7159 sets out the items that must be included in most home improvement contracts if the contract price exceeds $500. Business and Professions Code section 7159 has been amended since the Contract here was executed and performed.[7] However, for the purposes of our analysis, the relevant statutory language is the text of the statute in 2003 and 2004 when the parties entered into and performed the Contract.[8] In 2003, Business and Professions Code former section 7159 (hereinafter "former section 7159") provided in relevant part as follows:

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[7] See Statutes 1999, chapter 982, section 4 (version of statute in effect between Jan. 1, 2000, to June 30, 2005); Statutes 2004, chapter 566, section 4 (operative July 1, 2005); Statutes 2005, chapter 48, section 7 (effective July 18, 2005, operative Jan. 1, 2006).

[8] A new or amended statute applies prospectively only, unless the Legislature clearly expresses an intent that it operate retroactively. (*Tapia v. Superior Court* (1991) 53 Cal.3d 282, 287.) "[U]nless there is an 'express retroactivity provision, a statute will *not* be applied retroactively unless it is *very clear* from extrinsic sources that the Legislature . . . must have intended a retroactive application.' . . . '[A] statute that is ambiguous with respect to retroactive application is construed . . . to be unambiguously prospective.'" (*Myers v. Philip Morris Companies, Inc.* (2002) 28 Cal.4th 828, 841, citations omitted.) "A statute has retrospective effect when it substantially changes the legal consequences of past events." (*Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 243.) Business and Professions Code section 7159 was *extensively* rewritten after the events at issue. For example, as relevant here, the current version of the statute states that "[a] home improvement contract and any changes to the contract, shall be *in writing and signed by the parties* to the contract *prior* to the commencement of any work covered by the contract or applicable change order" (Bus. & Prof. Code, § 7159, subd. (d), italics added), and that "[a] change-order form for changes or extra work shall be incorporated into the contract and shall become part of the contract only if it is *in writing* and *signed by the parties prior* to the commencement of any work covered by a change order." (*Id*., subd. (c)(5), italics added.) Applying a new version of the statute here would unquestionably substantially change the *legal consequences* of the parties' contracting and conduct during the remodeling project because it would apply a whole different set of requirements to the Contract. Further, we find no indication in any

"This section applies only to home improvement contracts . . . between a contractor . . . who is licensed or subject to be licensed . . . and who contracts with an owner or tenant for work upon a residential building or structure, or upon land adjacent thereto, for proposed repairing, remodeling, altering, converting, modernizing, or adding to the residential building or structure or land adjacent thereto, and where the aggregate contract price specified in one or more improvement contracts, including all labor, services, and materials to be furnished by the contractor, exceeds five hundred dollars ($500).

"Every home improvement contract and every contract, the primary purpose of which is the construction of a swimming pool, is subject to this section. Every contract and any changes in the contract subject to this section shall be evidenced by a writing and shall be signed by all the parties to the contract. The writing shall contain all of the following:

"(a) The name, address, and license number of the contractor, and the name and registration number of any salesperson who solicited or negotiated the contract.

"(b) The approximate dates when the work will begin and on which all construction is to be completed.

"(c) A plan and scale drawing showing the shape, size, dimensions, and construction and equipment specifications for a swimming pool and for other home improvements, a description of the work to be done and

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subsequent amendments to Business and Professions Code section 7159 that the Legislature intended those amendments to apply retroactively.

Mirabella cites *Physicians Com. for Responsible Medicine v. Tyson Foods, Inc.* (2004) 119 Cal.App.4th 120, 125 for the proposition that "'"'the unconditional repeal of a special remedial statute without a savings clause stops all pending actions where the repeal finds them'"'" and "'"'[*t*]*he reviewing court must dispose of the case under the law in force when its decision is rendered*.'"' [Citations.]" However, Business and Professions Code former section 7159 is not a special remedial statute falling under this rule. The rule applies to "statutory remedies" giving rise to "a cause of action or remedy." (*Callet v. Alioto* (1930) 210 Cal. 65, 67-68.) Our decision does not depend on any statutory remedy set forth in former section 7159 at the time of the Contract and its performance.

description of the materials to be used and the equipment to be used or installed, and the agreed consideration for the work. [¶] . . . [¶]

"(e) A schedule of payments showing the amount of each payment as a sum in dollars and cents. In no event may the payment schedule provide for the contractor to receive, nor may the contractor actually receive, payments in excess of 100 percent of the value of the work performed on the project at any time, excluding finance charges, except that the contractor may receive an initial downpayment authorized by subdivision (d). . . . A failure by the contractor without lawful excuse to substantially commence work within 20 days of the approximate date specified in the contract when work will begin shall postpone the next succeeding payment to the contractor for that period of time equivalent to the time between when substantial commencement was to have occurred and when it did occur. The schedule of payments shall be stated in dollars and cents, and shall be specifically referenced to the amount of work or services to be performed and to any materials and equipment to be supplied. . . .

"(f) A statement that, upon satisfactory payment being made for any portion of the work performed, the contractor shall, prior to any further payment being made, furnish to the person contracting for the home improvement or swimming pool a full and unconditional release from any claim or mechanic's lien pursuant to Section 3114 of the Civil Code for that portion of the work for which payment has been made. [¶] . . . [¶]

"(h) No extra or change-order work may be required to be performed without prior written authorization of the person contracting for the construction of the home improvement or swimming pool. No change-order is enforceable against the person contracting for home improvement work or swimming pool construction unless it clearly sets forth the scope of work encompassed by the change-order and the price to be charged for the changes. Any change-order forms for changes or extra work shall be incorporated in, and become a part of, the contract. Failure to comply with the requirements of this subdivision does not preclude the recovery of compensation for work performed based upon quasi-contract, quantum meruit, restitution, or other similar legal or equitable remedies designed to prevent unjust enrichment. [¶] . . . [¶]

"(j) The language of the notice required pursuant to Section 7018.5.[9]

"(k) What constitutes substantial commencement of work pursuant to the contract.

"(l) A notice that failure by the contractor without lawful excuse to substantially commence work within 20 days from the approximate date specified in the contract when work will begin is a violation of the Contractors' State License Law.

"A failure by the contractor without lawful excuse to substantially commence work within 20 days from the approximate date specified in the contract when work will begin is a violation of this section. [¶] . . . [¶]

"The writing shall be legible and shall be in a form that clearly describes any other document that is to be incorporated into the contract. Before any work is done, the owner shall be furnished a copy of the written agreement, signed by the contractor."

The trial court determined that the Contract and the May 2004 Change Order failed to comply with the requirements of former section 7159 in several respects. First, the May 2004 Change Order was not "signed by all the parties to the contract." (*Ibid*.) Second, the Contract failed to include a schedule of payments as required by former section 7159, subdivision (e). Third, the Contract did not include all of the language regarding release of liens required by former section 7159, subdivision (f). Fourth, the Contract did not define what would constitute substantial commencement of work as required by former section 7159, subdivision (k).

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9 Before it was repealed effective in 2005 (Stats. 2004, ch. 566, § 1), Business and Professions Code former section 7018.5 set forth notice language concerning mechanics' liens.

Following our Supreme Court's decision in *Asdourian v. Araj* (1985) 38 Cal.3d 276, 291-293, the trial court concluded that because the Contract and the May 2004 Change Order did not comply with former section 7159, they were void and Mirabella accordingly could not recover based on their terms. Mirabella argues that the trial court erred because it did not consider whether, despite the fact that the Contract and May 2004 Change Order did not *technically* comply with all aspects of former section 7159, Mirabella could recover in quantum meruit for the value that it conferred on Von Herrath and Ford.

As we will explain, we agree with the trial court that the May 2004 Change Order is void and unenforceable because its does not comply with the requirements of former section 7159. However, we conclude that the trial court erred in not considering whether Mirabella could recover under a theory of quantum meruit based on the common count in its complaint which seeks recovery for the reasonable value of its services.

We note that the parties have extensively briefed whether the Contract complies with the requirements of former section 7159, as well as whether the May 2004 Change Order complies with those requirements. However, as we understand Mirabella's contentions, all of the relief it seeks arises under the May 2004 Change Order. As we further understand the undisputed facts, Von Herrath and Ford have made all of the invoiced payments relating to the original amount of $552,445.35 specified in the Contract. Thus, despite the parties' extensive briefing regarding the terms of the Contract and whether the Contract itself is void, we may streamline our analysis by focusing solely

on the issue of whether the May 2004 Change Order is void and, if so, whether Mirabella may nevertheless recover for the items set forth in the May 2004 Change Order.

3. *The May 2004 Change Order Is Void and Unenforceable*

We first consider whether the May 2004 Change Order is void and thus unenforceable because it fails to comply with the requirements of former section 7159.

Former section 7159 set forth specific requirements regarding change orders. Specifically, former section 7159, subdivision (h) (hereinafter section 7159(h)) provided as follows:

> "No extra or change-order work may be required to be performed without prior written authorization of the person contracting for the construction of the home improvement or swimming pool. No change-order is enforceable against the person contracting for home improvement work or swimming pool construction unless it clearly sets forth the scope of work encompassed by the change-order and the price to be charged for the changes. Any change-order forms for changes or extra work shall be incorporated in, and become a part of, the contract. Failure to comply with the requirements of this subdivision does not preclude the recovery of compensation for work performed based upon quasi-contract, quantum meruit, restitution, or other similar legal or equitable remedies designed to prevent unjust enrichment."

This provision does not expressly address the two most identifiable problems with the May 2004 Change Order. First, Von Herrath and Ford did not sign the May 2004 Change Order — but section 7159(h) does not expressly state that a change order is enforceable against homeowners only if signed by them. Second, Von Herrath and Ford were not presented with the May 2004 Change Order until the work was already performed — but section 7159(h) does not expressly state that the change order must be presented before

the work is performed. However, both of these requirements exist by virtue of provisions in *other* subdivisions of former section 7159.[10]

First, the second paragraph of former section 7159 states that "[e]very contract *and any changes in the contract* subject to this section shall be evidenced by a writing and shall be signed by all the parties to the contract." Second, former section 7159, subdivision (m) states that "[b]efore any work is done, the owner shall be furnished a copy of the written agreement, signed by the contractor." Based on these two provisions, former section 7159 required (1) that the May 2004 Change Order be signed by the parties, and (2) that the May 2004 Change Order be furnished to Ford and Von Herrath and signed by Mirabella before any work commenced on the items in the May 2004 Change Order. The undisputed facts are that neither requirement was met. The uncontradicted evidence shows that Mirabella presented Ford and Von Herrath with the May 2004 Change Order *after* the work had been performed, and that Ford and Von Herrath did *not* sign it.

Citing the general rule that "a contract made in violation of a regulatory statute is void," our Supreme Court in *Asdourian* held that a contract that violates Business and Professions Code section 7159 is *voidable* as an illegal contract, but that "there is no

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10 We note also that although the first sentence of section 7159(h) addresses a situation where there has not been "prior written authorization" for change order work *by the person contracting for the construction*, that sentence does not apply here because it describes only the effect on the *contractor's* obligation to perform. It does not address the issue we have here, i.e., whether the *homeowner* has an obligation to perform when it has not given prior written authorization for change order work.

indication that the Legislature intended that *all* contracts made in violation of section 7159 are void." (*Asdourian, supra,* 38 Cal.3d at pp. 291, 292.) *Asdourian* indicated that "exceptions to the general rule that illegal contracts are unenforceable may be applied" under the proper circumstances. (*Ibid*.) It explained that "[i]n compelling cases, illegal contracts will be enforced in order to 'avoid unjust enrichment to a defendant and a disproportionately harsh penalty upon the plaintiff.' [Citation.] '"In each case, the extent of enforceability and the kind of remedy granted depend upon a variety of factors, including the policy of the transgressed law, the kind of illegality and the particular facts."'" (*Ibid.*)

Under the facts presented in *Asdourian,* our Supreme Court ruled that the contracts were enforceable, despite the fact that they were not in writing. The court based its decision on the following factors: (1) defendants were real estate investors, rather than homeowners, and thus "not members of the group primarily in need of the statute's protection"; (2) "[t]here was nothing 'intrinsically illegal' about the agreements between plaintiff and defendant to repair and remodel the residential property," and thus the contracts were not void but merely "*voidable* depending on the factual context and the public policies involved"; (3) "plaintiff and defendants were friends, who had had business dealings in the past, the failure to comply with the strict statutory formalities is, perhaps, understandable"; and (4) "[p]laintiff fully performed according to the oral agreements[, and d]efendants accepted the benefits of the oral agreements," meaning that "[i]f defendants are allowed to retain the value of the benefits bestowed by plaintiff

without compensating him, they will be unjustly enriched." (*Asdourian*, *supra*, 38 Cal. 3d at pp. 292, 293.)

Here, in contrast to *Asdourian*, the undisputed facts do not support an exception to the rule that a contract failing to comply with Business and Professions Code section 7159 is voidable. First, Von Herrath and Ford were "members of the group primarily in need of the statute's protection" because they were homeowners who had never before entered into a home improvement contract and did not have any legal advice concerning the Contract. We reject Mirabella's argument that Von Herrath and Ford's history with do-it-yourself home improvement projects and their close involvement in the details of the remodel take them out of the class of persons in need of the statute's protections. Second, there were no past business dealings and no social relationship between Chilson, Von Herrath and Ford that would excuse the informality of the contracting practices as it did in *Asdourian*. Third, this case is radically different from *Asdourian* because there is no evidence of any oral agreement that Mirabella is attempting to enforce. Instead, the undisputed facts show that the May 2004 Change Order was presented to Von Herrath and Ford without any specific prior agreement by the parties to its terms.

We thus conclude that this is not a "compelling case" in which a contract that fails to comply with former section 7159 will nevertheless be enforced. Accordingly, the terms of the May 2004 Change Order may not be enforced.[11]

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11 Our decision is consistent with the only published California opinion that has applied *Asdourian*'s approach to contracts that violated the requirements of Business and Professions Code section 7159. In *Davenport & Co. v. Spieker* (1988) 197 Cal.App.3d

4. *Mirabella May Pursue a Claim for Recovery in Quantum Meruit*

Next we analyze whether, despite our decision that the May 2004 Change Order may not be enforced, Mirabella may nevertheless recover from Von Herrath and Ford under a theory of quantum meruit for the value of any benefit that it conferred on them for which it has not been compensated. Mirabella advocates this result, recognizing that "the failure of a contractor to secure all signatures might result in its having to resort to quantum meruit to recover for work done pursuant to the Change Order," and that "an unsigned change order does not bar the contractor from recovering in quantum meruit for the work performed under that change order."

Section 7159(h) expressly provides for recovery in quantum meruit when a change order does not comply with the necessary formal requirements set forth in that subdivision. Specifically, it states that "[f]ailure to comply with the requirements of this subdivision does not preclude the recovery of compensation for work performed based upon quasi-contract, quantum meruit, restitution, or other similar legal or equitable remedies designed to prevent unjust enrichment." (*Ibid*.) As we have discussed, section 7159(h) does not *precisely* address the requirements at issue here — i.e., that the parties *sign* the change order and that the change order be presented *before* work commences.

566, 571, the clients who hired the contractor worked for a real estate investment and development firm and had been in the construction business for many years. Based primarily on this fact, the court concluded that the contractor could recover for work performed pursuant to an unwritten agreement. (*Ibid*.) Here, as we have explained, Von Herrath and Ford were homeowners without experience in real estate investment or construction contracts. Accordingly, unlike the clients in *Davenport*, they are within the class of persons in need of the consumer protection provided by former section 7159.

However, section 7159(h) *does* state that a change order is not enforceable against the person contracting for the home improvement work unless it clearly sets forth the scope of work encompassed by the change order and the price to be charged for the changes. We construe this requirement to incorporate the more general requirements set forth in other portions of former section 7159 requiring a valid change order to be signed by all of the parties and to be presented before work commences.[12] Mirabella did not comply with section 7159(h) because, at the pertinent time, it did not present a signed change order that "clearly set[] forth the scope of work encompassed by the change-order and the price to be charged for the changes." (*Ibid*.) We thus conclude that the availability of quantum meruit relief as referenced in section 7159(h) applies here.[13]

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[12] Because we construe section 7159(h) to incorporate the more general requirements set forth in other portions of former section 7159, we reject Von Herrath and Ford's argument that the Legislature intended to allow recovery in quantum meruit only when the change order fails to comply with the specific requirements set forth in the *text* of section 7159(h). In addition, Von Herrath and Ford argue that *no* written change order was ever presented for the charges at issue here and that the terms of section 7159(h) thus should not apply. We disagree. Mirabella did *eventually* attempt to present a written change order. However, as we have explained, it was impermissibly presented after the work was finished and was not signed by Von Herrath and Ford. Thus, the terms of the May 2004 Change Order may not be enforced, but, as established by section 7159(h), recovery in quantum meruit may be available.

[13] We note that the parties discuss case law addressing whether a contract that is void because it fails to comply with statutory requirements may, under general principles, be enforced under a theory of quantum meruit. Because in this case the Legislature has specifically indicated that a contractor may recover in quantum meruit despite the fact that a change order does not comply with statutory requirements, we need not go beyond the language of the statute itself to determine that quantum meruit is available in this instance.

A plaintiff may pursue recovery in quantum meruit through a common count for the recovery of the reasonable value of services. (See *Lawn v. Camino Heights, Inc.* (1971) 15 Cal.App.3d 973, 980-983 [plaintiff permitted to pursue recovery in quantum meruit for an unenforceable contract through its pleading of a common count for the reasonable value of its services].) Here, Mirabella's complaint included a common count seeking to recover the reasonable value of its services, and it may thus pursue recovery in quantum meruit on the basis of that common count.

5. *A Triable Issue Exists with Respect to Mirabella's Claim for Recovery in Quantum Meruit*

Having determined that Mirabella may rely on the theory of quantum meruit, we next consider whether a triable issue of fact exists on its claim for recovery in quantum meruit.

"[I]n order to recover under a quantum meruit theory, a plaintiff must establish *both* that he or she was acting pursuant to either an *express or implied request* for such services from the defendant *and* that the services rendered were *intended to and did benefit* the defendant. One court summarized the rule as follows: 'The theory of quasi-contractual recovery is that one party has accepted and retained a benefit with full appreciation of the facts, under circumstances making it inequitable for him to retain the benefit without payment of its reasonable value.'" (*Day v. Alta Bates Medical Center* (2002) 98 Cal.App.4th 243, 248.) "To recover in quantum meruit, a party . . . must show the circumstances were such that 'the services were rendered under some understanding or expectation of both parties that compensation therefor was to be made.'" (*Huskinson*

& Brown v. Wolf (2004) 32 Cal.4th 453, 458, citations omitted.) Further, "[t]he measure of recovery in *quantum meruit* is the reasonable value of the services rendered, provided they were of direct benefit to the defendant." (*Palmer v. Gregg* (1967) 65 Cal.2d 657, 660.)

Based on the facts presented by the parties in support of and in opposition to the motion for summary judgment, a clear material factual dispute exists regarding many of the elements necessary for a recovery in quantum meruit. These material factual disputes include whether Von Herrath and Ford made an express or implied request for the services set forth in the May 2004 Change Order, whether the services benefited them, the reasonable value of the services, whether the Contract already covered the services detailed in the May 2004 Change Order, and whether Von Herrath and Ford had a full appreciation of the facts and an understanding or expectation that additional compensation would have to be made for the items in the May 2004 Change Order. These questions of fact preclude summary judgment on Mirabella's claim for recovery in quantum meruit.

Thus, the trial court erred insofar as it granted the motion for summary judgment on Mirabella's common count for recovery of the reasonable value of its services. That common count presents a triable issue of material fact as to whether Mirabella is entitled to recovery under the doctrine of quantum meruit for the reasonable value of any benefit conferred on Von Herrath and Ford that was not already encompassed in the Contract (including the Bid Document) or in the change orders that Von Herrath and Ford compensated Mirabella for in September 2003.

C. *Summary Judgment Was Proper As to the Fraud Cause of Action*

After reviewing the evidence presented by the parties in connection with the motion for summary judgment, the trial court concluded that summary adjudication was proper as to the fraud cause of action.[14] We agree.

Von Herrath and Ford met their initial burden to show that Mirabella could not establish an intent to defraud. (See *Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638 ["'The elements of fraud . . . are (a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or "scienter"); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage'"].) They did so by submitting declarations stating that they never requested work to be performed by Mirabella without intending to pay and that at all times they had the ability to pay.

Mirabella submitted no evidence to controvert these statements, and thus did not carry its burden to show a triable issue of fact as to whether Von Herrath and Ford acted with fraudulent intent. Accordingly, summary adjudication was properly granted as to the cause of action for fraud.

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[14] We note that although it has appealed generally from the trial court's summary judgment ruling, Mirabella does not expressly address the trial court's ruling on the fraud cause of action in its appellate briefing.

DISPOSITION

The judgment is reversed in part, and this case is remanded for proceedings consistent with this opinion. In all other respects, the judgment is affirmed. The parties are to bear their own costs.

IRION, J.

WE CONCUR:

HUFFMAN, Acting P. J.

O'ROURKE, J.